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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **DEFENDANT'S MEMORANDUM**
) **RE: RULE 19.5**

22 Steven DeMocker, through his counsel, submits this Memorandum in aid
23 of proceedings pursuant to Rule 19.5.

24 **MEMORANDUM**

25 **I. The Process of Identifying a Replacement Judge**
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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK

BY: B. Chamberlain ✓

1 On Thursday, June 17, 2010, on the twenty-third trial day in *State v. Steven*
2 *DeMocker*, Judge Lindberg fell ill and eventually determined that he would not be in a
3 position to resume the trial. Judge Brutinel, Presiding Judge of the Yavapai County
4 Superior Court, initiated a search for a replacement judge pursuant to Arizona Rule of
5 Criminal Procedure 19.5. The parties received a list of retired judges maintained by the
6 Arizona Supreme Court on June 21. Arizona Supreme Court Administrative Order
7 (Order No.2001-62). The search was intended to be a cooperative endeavor with the
8 parties agreeing to or rejecting proposed names of retired and active judges throughout
9 Arizona who might be in a position to immediately resume what is expected to be a
10 several month long trial.

11
12 Throughout this process, the defense proposed thirteen potential replacement
13 judges. The Court proposed five judges. The State did not propose any judges. Of the
14 eighteen judges identified by the defense and the Court, the State agreed to five and
15 rejected thirteen. Of the eighteen judges identified, the defense rejected one judge and
16 agreed with the State that another judge would not be acceptable. The defense agreed to
17 sixteen possible judges.

18
19 On June 28, 2010, the parties met with Judge Brutinel and discussed the possible
20 appointment of a judge who was acceptable to the parties but who was not available to
21 resume the trial until August 3, 2010. The following day the parties met with Judge
22 Brutinel in an off the record session where Judge Brutinel informed the parties that one
23 of the defense identified judges was available to begin the trial immediately. The State,
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1 although previously asked by the defense and the Court about its position with respect
2 to the available judge, did not have a response as to the judge's acceptability to the State
3 at that time. Judge Brutinel informed the parties that if they did not agree on the
4 immediately available judge, he would appoint Judge Warren Darrow. Judge Brutinel
5 then held an on the record hearing in the presence of the jury and ordered them to return
6 on July 7, 2010 to possibly resume the trial. After the hearing, the State rejected the
7 immediately available judge who had been identified by the defense and another judge
8 proposed by the defense.
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10
11 On July 1, Judge Darrow set a telephonic status conference for July 2.

12 **II. The Required Review Under 19.5.**

13
14 Rule 19.5 provides as follows:

15 If the judge before whom a trial or other criminal proceeding is
16 pending dies, becomes ill, or in any other way becomes incapacitated,
17 any other judge of the same court may take the judge's place. If no
18 other judge is available, the clerk, sheriff, or bailiff shall recess the
19 court and notify the Chief Justice of the Supreme Court, who shall
20 continue the trial until he or she appoints another judge to resume the
21 proceedings. If, in the opinion of the new judge, after a review of the
22 record, the continuation of the proceeding would be prejudicial to
23 either the state or a defendant, the judge shall order a new trial or
24 proceeding.

25 (emphasis added). The Comment to Rule 19.5 cites several authorities that give
26 guidance as to the level of review required by a judge in considering whether "the
27 continuation of the proceeding would be prejudicial to either the state or a defendant."¹
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¹ Although the Comment notes that "the court reporter need not transcribe his notes if the new judge has an alternative method of reviewing the record," the eight days of trial testimony have been transcribed. Several other transcripts of evidentiary hearings and rulings were previously transcribed and have been printed and organized for delivery to the new judge by the defense.

1 The Comment indicates that the rule “is in accord with the ABA, Standards Relating to
2 Trial by Jury, S 4.3 (Approved draft, 1968)” and cites to *State v. Jones*, 6 Ariz. App. 26,
3 429 P.2d 518 (1967). The Comment further states that “[t]he language is derived from
4 Cal. Penal Code Ann. S 1053 (West 1970) and Federal Rules [sic] of Criminal
5 Procedure 25(a).”

6 Although the Comment cites to the 1968 version of the ABA Standards relating to
7 Trial by Jury Section 4.3, 4.3 relates to judicial communication with jurors. However,
8 ABA Standards Relating to Trial by Jury Section 3.3 is on point and provides as
9 follows:

10 Standard 15-3.3. Substitution of judge

11 If, by reason of death, sickness, or other disability, the judge before whom a jury
12 trial has commenced is unable to proceed with the trial, another judge, upon
13 certifying that he or she has familiarized himself or herself with the record of the
14 trial, may proceed with and finish the trial.

15 (emphasis added). This Standard requires a court to certify his familiarity with the
16 record of the trial before proceeding with trial.

17 Likewise, *State v. Jones*, 6 Ariz. App. 26, 429 P.2d 518 (1967) requires that a
18 replacement judge fully familiarize himself with the record of the case. The pertinent
19 language in *Jones* is that the court must become “completely familiar” with the entire
20 case. “In the few cases where a substitute judge has been permitted to enter a case after
21 the proceedings have already begun the courts have been very cautious to note that this
22 will only be permitted *where the substitute judge becomes completely familiar with the*
23 *entire case.*” *Jones*, 6 Ariz. App. 26, 429 P.2d 518 citing *State v. McCray*, 189 Iowa
24 1239, 179 N.W. 627 (1920) (emphasis added).

1 Finally, Federal Rule of Criminal Procedure 25(a)(2) "Judge's Disability" also
2 requires a replacement judge to actually certify his familiarity with the record. That
3 Rule provides:

4
5 (a) During Trial.

6 Any judge regularly sitting in or assigned to the court may complete a jury trial if:

7 (1) the judge before whom the trial began cannot proceed because of death,
8 sickness, or other disability; and

9 (2) *the judge completing the trial certifies familiarity with the trial record.*

10 (emphasis added). The Comments to the Rule note that California Penal Code, Section
11 1053 is similar to the Federal Rule.

12 **III. The Record to Be Reviewed.**

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14 Jury selection began in April with the death-qualification/questionnaire process.

15 Actual voir dire began on May 4. Opening statements in the trial itself after the
16 empanelment of this jury did not occur until June 3, 2010. Therefore, there have been
17 only 8 days of actual evidentiary presentation to this jury. Expedited transcripts of
18 those proceedings have been prepared and are now available.

19
20 Mr. DeMocker was indicted in October of 2008 and the State sought the death
21 penalty. After several weeks of voir dire, the State abruptly dismissed the death penalty
22 allegation. Throughout the past almost two years, the parties have engaged in intensive
23 pretrial litigation, including numerous days of evidentiary and motions hearings. The
24 defense has prepared a summary of the Court's evidentiary rulings in a nearly 200 page
25 document that excerpts minute entries and transcripts by subject matter. This summary
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1 was provided to the State, by order of Judge Brutinel, on June 24, 2010. The State has
2 indicated it objects to this document but has not identified what its objections to
3 excerpts might possibly be. Attached to the document in chronological order are the
4 indexed and tabbed transcripts and minute entries relating to evidentiary hearings as
5 cited in the document. This is available for immediate delivery to the Court. The
6 defense has also compiled a list of 136 Minute Entries issued by the Court through June
7 23, 2010. Many of those rulings relate to the exclusion of evidence and to other issues
8 that remain relevant to the trial (e.g., rulings with respect to *Wilitts* instructions, and
9 many rulings on the scope of testimony by expert and fact witnesses). There are also
10 many additional minute orders and rulings that relate to the case that the new Judge will
11 want to review, including rulings on Mr. DeMocker's conditions of release, rulings on
12 exceptions to the exclusion of witnesses, and other matters.

16 CONCLUDING OBSERVATION

17 Mr. DeMocker remains in custody. Members of his large family have assembled
18 in Prescott and have made arrangements to spend as much of the summer as necessary
19 and possible here. The defense team, including lawyers, paralegals, our investigator,
20 and staff have all made arrangements to see this trial to its conclusion. Witnesses on
21 both sides – experts and fact witnesses alike – have made arrangements to be available
22 for testimony this summer.

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24 Accordingly, Defendant respectfully requests that this Court:
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1. Order the parties to submit in writing no later than noon on July 5, 2010 their good faith estimate of the total number of trial days necessary to present the balance of their respective cases;
2. Direct that the defense summary of evidentiary ruling described above be delivered to Judge Darrow pursuant to his instructions;
3. Set a hearing on July 9, 2010 to advise the parties of the Court's progress in completing the record review called for in Rule 19.5.

Respectfully submitted this 2d day of July, 2010

By: 

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ORIGINAL of the foregoing hand delivered for filing this 2d day of July, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

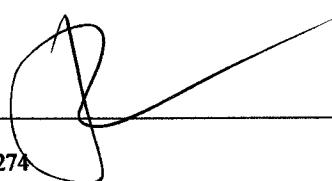
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COPIES of the foregoing hand delivered and/or e-mailed this
this 2d day of July, 2010, to:

The Hon. Robert Brutinel
Judge of the Superior Court
120 S. Cortez
Prescott, AZ 86303

The Hon. Warren R. Darrow
Judge Pro Tem of the Superior Court
Division B
2840 N. Commonwealth Drive
Camp Verde, AZ 86322

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